WAR ? ? Or Judicial Settlement

Of International Disputes ?

A REPLY

TO

Dr. JAMES BROWN SCOTT

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Author of "THE STATUS OF THE INTERNATIONAL COURT OF JUSTICE" Published

in Nos. 15 and 16 of the Quarterly Issues.

Nobody can read his able article without gaining the impression that the way for Judicial settlement is fully laid out, and that it merely takes the consent of the Powers to create a Court which would do away with war, and would justly and amicably settle International disputes. This, the first impression gained from reading his article, is wrong.

BY

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Often you hear people ask: Why should there be war? Why don't governments apply to the Hague tribunal whenever they can't agree with each other? Why do they prefer to go to war rather than submit their disputes to the International Court of Justice, and abide by its decision?

Mr. J. B. Scott has explained the reason in a very lucid, very able treatise, recently published by the American Society for Judicial Settlement of International Disputes. He points out that the so-called "Permanent Court" now existing at the Hague, is more a matter of name than of reality; and that, in fact, it is nothing like what ordinarily is understood by a "Court of Justice." Whenever a government feels grieved at the action of another government, it cannot go to the Hague tribunal and ask for relief; it can only invite the other government that both of them settle their dispute peaceably at the Hague—in which case each one of the two governments sends one or two judges over, and these judges, after choosing an umpire, constitute a Court—which Court convenes only for the sake of that individual dispute, and disbands after rendering judgment on same.

Now, really, for such kind of proceeding we hardly need the Hague. That can be done, almost as well, by regular diplomatic action. And the above-named Society, fully aware of the fact that the chief motive for seeking judicial settlement has so far been lacking, is trying hard for the establishment of a real Court of Justice, which leaves it no longer to the option but makes it compulsory for the member-Powers to have their disputes settled through that International Court, and abide by its award.

In other words, while at present *both* of the quarreling nations would have to apply at the Hague before the Court takes action, it then would take only one nation to apply and make complaint, while the other would be summoned by the Court, to respond, if a member-Power. And there would not, as now, be a special Court appointed for each special case, but a permanent Court would rule, its members being chosen by the member-Powers, and retaining office for twelve years. A substitution of judicial judgment for mere arbitration.

This proposition was discussed at the Hague Conference of 1907, but not accepted, principally because a suitable basis for selecting the judges could not be found—naturally a vital point. It was thought that no more than fifteen judges could be employed to advantage, and as there were 44 member-Powers, the smaller ones of these feared they would not be properly represented if only the 15 larger ones had the privilege to send a representative. To overcome this difficulty it has recently been suggested that only the large Powers, 8 or 9 of them, should start the judicial Court, this under the presumption that the smaller Powers would join later on when seeing an accomplished fact before them, and would then no longer insist upon installing representatives of their own.

This suggestion sounds very plausible; and such being the present status of the movement. it looks indeed as though it merely took the consent of the Powers to make an end to wars. But would such a "judicial" international Court really fill the bill? I see three grave objections to it: first, no guarantee of impartial and really judicial judgment; second, no code of sufficient amplitude to form the basis of international law; third, no method pointed out for enforcing a judgment. Let us consider these three objections separately.

FIRST, Partiality.—Such indeed must be expected of a judge who, under present conditions, were picked out to go to the Hague and sit on a case of his own nation against another. It was this point which prompted Senator Elihu Root to advocate, instead of the present "merely arbitral" temporary Courts, a permanent Court composed of judges "acting under the sanctity of the judicial oath, under a sense of judicial responsibility, men of such dignity, consideration and rank that the best and ablest jurists would accept appointment to it, and would pass upon questions between nations with the same impartial and impersonal judgment as we are used to on the part of the Supreme Court of the United States."

But has our Supreme Court always proved to be impartial? Let us refer to the Presidential Election of 1876. The democratic candidate, Tilden, had undoubtedly been elected, as well by a majority of the people as by a majority of the States, but the Republicans, then in power, tried to undo him, bringing up points which never had been guiding before. They appealed to the Supreme Court. As this body consisted of five Republicans and four Democrats, I offered a man a bet that the decision would be rendered strictly according to party lines. He resented my view, claiming that men of such

undoubted integrity, would not be biased by party prejudice. But I won my bet.

Does not that decision, a historical fact, fully prove that even the best men are apt to be guided by personal inclination? And how much more would such be the case with men of different nationalities, sitting in an international Court? Would not they naturally have a weakness for their own, or a befriended nation?

You may say "Ay, in 1876 we did not have the laws, made since, which govern the details of Presidential elections. It could not now occur any more that a President were installed by counting him in, though not elected."—Quite true. But what does that prove? That in international law, which has been but little developed, and which leaves so many points open for decision *by sentiment*, this latter factor will predominate to a much larger extent, than in our domestic courts.

Such being the fact, how would Germany fare in an International Court formed by delegates from nine Powers, of which only one, Austria, would be friendly and the remaining seven antagonistic to her?* Had she a grievance which were plainly covered by international law, there would probably be no necessity for her to apply to the Court, but if not fully covered by the international code, leaving the award subject to the opinion and sentiment of the judges, could she be sure of finding justice and an impartial decision at the hands of the Court?

It is from doubts in this line that most other nations have hesitated to tie themselves down to submission to a set of judges the impartiality of whom they may not be sure of—whose award may be influenced by regards for their own countries and their allies, also by public opinion current in the press of the leading nations—not even considering the possibility of bribe, where large interests are at stake.

*Germany has almost no friends abroad—a peculiar fact. The reason must be found in the lack of diplomatic ability of the Germans, which lack extends to the whole of the people (excepting the Jews), so much so that they do not know how to swim along with others or how to make friends abroad. Besides, they lack aggressiveness, and the ability to assert themselves, even where they have the power. Other nations, of aggressive character, stand ready to take advantage of this, thinking German territory an easy prey to combined action: France would want the Alsace; Japan, Kiau-Chau; Italy, Istria; Russia, some Baltic provinces; and England would be glad to destroy Germany's fleet and merchant marine, so as to suppress an inconvenient competitor in the world's ocean trade. Such being the disposition among the leading powers, most likely shared in by the delegates of these powers, sitting in Court, Germany's chances for meeting impartial justice in that Court would not be encouraging.

SECOND, Lack of a Code.—True, a large amount of material has already been codified, quite respectable for a beginning; but not sufficient, by far, to cover the majority of cases likely to be submitted to the International Court.

It is held that the expansion of the Code will develop gradually, as cases come up and awards are made—the same as the development of our civic code was a gradual affair. In the meantime, however, the usefulness of the two codes is not alike, the guidance offered by the one being ample, by the other but scant—and, being scant, there would be too much scope left for the international judges to go by mere opinion and sentiment; this is just what the governments feel uneasy about.

It is far easier to make the nations submit to a code of international law than to a set of judges. And if so, the peace movement should first of all endeavor to get up a code, ample enough to cover most of the disputes likely to come in. To do that, past-history should be consulted, and thousands of cases examined to consider what laws would be required to do justice to each case if it came up before the Court. I believe a suitable comprehensive code to be the first requirement for attaining the judicial settlement which we are after.

THIRD, Enforcement.—Can we depend upon a loyal compliance with any sentences the International Court may decree? Hardly, unless there be some means of enforcement. Nations are not always ready to fulfill international obligations if it don't suit them. I remember a case where England, in the course of arbitration, was sentenced to pay a sum of money—but a number of years later the amount was still unpaid; perhaps even now. And look at Italy! For many years she was a member of the triple alliance, and was in duty bound to help her allies as soon as England joined France in making war upon same, but she simply refused, offering the preposterous excuse that England had not formally declared war, but had merely stated to be on a war footing with Germany. And did Europe resent her for this breach of promise? Not at all! Just the reverse, the leading Powers lauded her for her faithless action, and are even coaxing her to heap crime upon injury, by drawing the sword against her very ally.

Such being the sentiment at present, in regard to fulfilling international obligations, what can we expect as to the fulfillment of obligations imposed upon nations by the International Court, unless

there be some means of enforcement? This point seems to have been neglected.

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The above three difficulties—danger of partiality among the judges, lack of a suitable code, and inability to enforce the fulfillment of obligations which may result from international decisions—seem to be the main reason why an International Court has not been established so far. I should not wonder, however, that this will be done after the war is over, under the lead of the victor. Maybe that the aggressive nations, those that are hungry for aggrandizement, will join to form an International Court among themselves: France, England, Russia, Italy, Servia, Greece, Japan. A certain community of interest will do its part to secure harmonious action among them, so they will rule the world. The United States will no doubt join, and also the rest of the Powers can hardly do better than to follow suit. Then we will have an International Court; not exactly one built up on those ideal principles which are now guiding the advocates of the peace movement, but one that will work and which will certainly be an improvement over present conditions.

THE CRIPPLING OF OUR EXPORT TRADE.

WAR RISKS ON THE OCEAN.
DISTURBANCE OF OUR DOMESTIC BUSINESS
PARALYZING TRADE ALL OVER.
WHOSE DOING IS ALL THIS?

Whose doing it is? Why, of course, the War Lord's. He plunged the world into war, glory-mad as he is. Were the consequences merely falling on his own country, we might stand by and pity his people; but why should we, here in America, be made to suffer from his doings?

This is the sentiment shared in by almost every American. He takes his cue from the daily press, and the American press very largely takes its cue from the English.

Is it really the War Lord who broke the peace, and precipitated the war? The emperor who for twenty-five years of peaceful government has so often shown his hand as a peacemaker, and to whom even our Carnegie conceded that he was a Lord of Peace? The Emperor who up to the very last day tried hard to avert the war, and gave up his endeavors only because he had to stand by his ally? Must we look to him as the cause of our troubles? Hardly. The real cause of the great war lies with Russia, inasmuch as she declared she would help her Slav brothers in Servia against Austria. And as to our own troubles we must neither look to Germany nor to Russia, but to—England.

Had the Emperor had his own way there would be, in spite of the war, an open sea, and no interference with ocean traffic. But that is not what would suit England.

She upholds her unique position as master of the sea (and therewith of the world's trade) not so much by her tremendous fleet as by the mean, contemptible principle of piracy. Cut this out, and most of England's power is gone.

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Why should private property at sea be proscribed and subject to confiscation during war, while private property on land is not. Why should not the rights of the owner to his property be the same, and be respected the same, whether it be a ship within the enemy's reach, or a house within his reach, or property within the house. If a ship

belonging to a peaceable citizen were seized by a regular pirate, the latter would be doomed, if caught. If seized by the enemy, however, the act is legal, and a matter of praise.

But for England's resistance, a common-sense international law covering this subject would have been agreed on long ago; and in that case our export and import trades would not now be suffering the way they are, from the present war. The adoption of such a law, however, and the limitation of the horrors of naval warfare which it would bring about, is not what England wants. She prefers to strike at both, the enemy's navy and the enemy's trade—and is more pleased than worried if, in consequence, the trade of neutral countries suffers too. That makes her own power all the more felt, all the more formidable.

Under a common-sense agreement, such as we ought to have, German and French and English merchantmen should carry on their traffic as before, without fear of being seized, except if a port were closed by blockade and a ship were caught in trying to run the blockade—then of course it would be taken. Nor should merchantmen be stopped on the way and searched for contraband goods; a warring nation should be privileged to obtain such just as well by water as from a neighboring friendly country by land.

These ideas may seem utopian. But I think we will get there in course of time. Meanwhile we should try hard for some sort of agreement to alleviate the unnecessary hardships now imposed by naval powers on peaceable ocean traffic. And we should remember that it is England who obstinately opposes all progress in this direction; that it was her who refused to participate in the modifications of prize-court regulations, adopted by the Naval Conference of 1909; also that her contraband definitions are exceedingly drastic and severe. Let us remember that the hardships thrown on our own trade, though ascribed entirely to the doings of the War Lord, would not have befallen us but for the piracy tactics of England. And that, if the horrors of the European war may remind us of mediaeval times, her reckless warfare on trade and commerce makes bad things worse.

Without her doings neither Russia nor France would have mobilized, and we would not have this terrible European war; nor would our own affairs be in that deplorable state of depression under which we are now suffering.